Filed 4/26/10 In re L.S. CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

---

| | |
|---|---|
| In re L.S., a Person Coming Under the Juvenile Court Law. | |
| YOLO COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>T.S.,<br><br>Defendant and Appellant. | C061884<br><br>(Super. Ct. No. JV08-579) |

Mother, T.S., appeals from a juvenile court order removing the minor, L.S., from mother's custody. On appeal, mother contends: (1) the petition for the minor's removal was insufficient to state a cause of action; (2) there was insufficient evidence to support the juvenile court's jurisdiction over the minor; (3) the court lacked substantial evidence to remove the minor from mother's custody; (4) reasonable efforts were not made to prevent the need for removal of the minor from her mother's custody; and (5) the

Yolo County Department of Employment and Social Services (the Department) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA).

Finding mother's claims to be without merit, we affirm the order of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2008, mother appeared at the West Sacramento police station with her minor daughter, then seven years old. Mother explained to the police that she and her daughter had been living in their truck for the last four days, and she had no money. Mother asked the police to please put her daughter somewhere safe.

The police contacted the Department which came and took the child into their custody. The minor met with a social worker and was placed in a foster home. A Welfare and Institutions Code section 300 petition[1] was then filed, alleging mother failed to protect the minor.

Two days later, a detention hearing was held and mother asked to have the minor returned to her custody. The court learned mother was admitted to a transitional housing program in Roseville intended for families.

Convinced mother was on the right track, the court returned the minor to her care. However, the court ordered mother to remain in the program, or contact the Department immediately if

---

[1] Further undesignated statutory references are to the Welfare and Institutions Code.

she left. Mother also was ordered not to drive her truck because her license was suspended and the truck was neither insured nor registered. Mother acknowledged the orders in open court, and the child was returned to her. The jurisdiction hearing was then set out 30 days.

Nearly three weeks later, a social worker from the Department visited mother and the minor at the housing program. Mother indicated to the social worker that she may not stay in the program because she did not have access to an emergency phone on the weekends and she was concerned about the program's requirement that she watch other people's children. The social worker reminded mother of the court's order to remain in the program; mother said she understood.

Nevertheless, two days later, the Department received word that mother left the housing program, driving off with the minor in her truck despite the court's order that she not drive. The social worker then contacted the minor's school and learned mother had taken the minor out of school the previous day for a "doctor's appointment" and never returned.

Six days later, someone from the housing program contacted the Department and told them mother was returning to retrieve some of the personal belongings she had left behind. The social worker returned to the housing program and met with mother, who did not have the minor with her. When asked, mother reported that she and her daughter were staying with an "'aunt'" in Marysville. Mother gave the social worker an address but had no phone number. She also indicated the minor was now enrolled in

home-school. Mother told the social worker she intended to be at the hearing the following week and, if she had to, would "turn the minor over at that time."

Later, the social worker contacted the Marysville Sheriff's Department and asked that they visit the "'aunt's'" residence. A deputy later informed the social worker that the "'aunt'" told him mother and the minor left the residence the night before.

Two days later, on November 14, 2008, the Department received another phone call from the housing program and were told mother and the minor were staying at Vince's Motel in Sacramento. Apparently, mother took the minor to Capital Christian Center and pled homelessness. She was thus given a motel voucher for three nights and food. That same day, a Sacramento County Sheriff's deputy served a protective custody warrant at Vince's Motel and took custody of the minor. Five days later, an amended section 300 petition was filed alleging mother failed to protect the minor, including allegations that mother failed to comply with the court's order to remain in the housing program.

On November 20, 2008, a detention hearing was held on the amended petition. After considering the jurisdictional report prepared by the Department and hearing testimony from the social worker, the court concluded there was a substantial risk of harm to the minor if left in mother's care. The court noted that "all of the conditions that Judge Warriner had placed on [mother] were violated within short order, including giving notice if she were going to leave a place where she was given

free room and board and where the child had, at least, a roof over her head." The minor was thus placed in the custody of the Department and a jurisdictional hearing on the amended petition was set for December 10, 2008.

The jurisdictional hearing was later held on December 29, 2008. After hearing testimony from the social worker and reviewing the Department's jurisdictional report, the court took jurisdiction over the minor finding she was "a person described by Section 300 of the Welfare and Institutions Code." In reaching its decision, the court resolved that mother's poverty was not the "issue," rather, the issue was "with the mother in terms of her own lifestyle and in terms of, perhaps, some opportunities for the minor. The issue is the instability and the pattern of running around from place [to] place."

The court further explained that it "takes very seriously the fact that this mother was given an opportunity previously, and also back on October 16th Judge Warriner of this Superior Court directed the mother to go to the program and to remain there and then notify the Department when she is leaving, and that does not take place, and the Department, then, had to track down the mother and the minor." A disposition hearing was then set for January 21, 2009.

The disposition hearing did not, however, occur until March 26, 2009. At the hearing, the social worker testified that mother did not have a diagnosed mental illness and was resourceful, finding transitional housing programs without help from the Department. Mother also had taken it upon herself to

begin a parenting class. However, mother also continued to leave behind "very good opportunities" without much explanation.

According to the social worker, mother had moved six times since she brought the child to the police station in West Sacramento five months earlier, including one move out of state. And, despite the child's young age, she already attended "at least eight different elementary schools, covering three different states . . . ."

The social worker explained that at least one of mother's moves was encouraged by the Department because, while the minor was in foster care, mother had moved in with her boyfriend who subsequently abused her. When she left him, it was at the Department's urging. At the time of the hearing, mother had returned to a transitional program known as "the Door of Hope."

At the conclusion of the hearing, the court adopted the Department's recommendations. Accordingly, the minor remained in foster care, the court adopted the proposed reunification plan, and ordered services for both the minor and mother. A six-month review hearing was then set for September 9, 2009. Mother appeals from that order.

## DISCUSSION

### I

Appellant claims the allegations of the petition are inadequate to state a basis for juvenile court jurisdiction. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1132-1133; *In re Alysha S.* (1996) 51 Cal.App.4th 393 (*Alysha S.*).) Appellant failed to challenge the petition below; however, under *Alysha S.*

the issue may be raised for the first time on appeal. (*Id.* at p. 397.) Respondent urges us to follow the waiver rule of *In re Shelley* J. (1998) 68 Cal.App.4th 322.

In *Alysha S.*, this court, relying on our earlier decision in *In re Fred J.* (1979) 89 Cal.App.3d 168, 176, and footnote 4, first observed that a challenge "'akin'" to a demurrer was available in a dependency action to test the sufficiency of the allegations in the petition. (*Alysha S., supra*, 51 Cal.App.4th at p. 397.) We then concluded that such a claim relating to the sufficiency of the petition to state a basis for a dependency proceeding was also not waived on appeal even if not previously raised. We did so by drawing an analogy to the civil law in which a claim that a pleading failed to state a cause of action is not waived by failing to assert it in the trial court. (*Ibid.*)

We continue to adhere to our conclusion in *Alysha S.*, *supra*, 51 Cal.App.4th 393, and conclude appellant may raise the issue for the first time here and now.

An *Alysha S.* challenge, like a demurrer, is limited to the face of the petition. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 952, p. 367.) We construe well-pleaded facts in favor of the petition to determine if the Department has stated a basis for dependency jurisdiction. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "This does not require the pleader to regurgitate the contents of the social worker's report into a petition, it merely requires the pleading of essential facts establishing at least one ground of juvenile

court jurisdiction." (*Alysha S., supra*, 51 Cal.App.4th at pp. 399-400.)

The petition in this case was based primarily on section 300, subdivision (b). A cause of action in dependency under this subdivision requires proof that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ." (§ 300, subd. (b); *In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) A substantial risk of physical harm may be inferred from the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries, or a combination of these and other factors. (*In re Rocco, supra,* at p. 823.) However, "past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.'" (*Id.* at p. 824; *In re Nicholas B., supra*, 88 Cal.App.4th at p. 1135.)

The petition in this case alleged the following facts in support of the allegation that the minor had suffered, or there was a substantial risk that she would suffer, serious physical harm or illness as a result of the failure or inability of appellant to supervise or protect her adequately:

"b-1 On October 10, 2008, the mother, . . . took the minor to the West Sacramento Police Department stating that she could not care for the minor at this time. The mother reported that she is currently homeless, has no money and has been staying in

her vehicle with the minor for the last four days. On October 14, 2008, the mother entered Roseville Home Start, a transitional living program in Roseville, California. On October 16, 2008, the Honorable Thomas E. Warriner returned the minor to the mother's care as she had located safe and stable housing with the understanding that the mother would remain in the program. The Court ordered the mother to notify the Department should she leave the housing program. On November 5, the mother left the program and failed to notify the Department. The Department made diligent efforts to locate the minor and a protective custody warrant was issued on November 13, 2008, by the Honorable Paul K. Richardson. The minor was located and detained at Vince's Motel in Sacramento, California on November 14, 2008.

"b-2 The minor has not been attending school. The minor has attended approximately eight (8) elementary schools in three states to include Washington, Oregon and California. The minor is currently repeating the 1st grade. The mother took the minor from Spanger Elementary School in Roseville, California on November 5, 2008 where the minor had been enrolled since October 20, 2008.

"b-3 The mother has a lengthy history of inadequate and unstable housing and has failed to provide the minor with stable housing. The mother reported that she moves around a lot and needed a safe place for the minor. The mother has resided in at least three (3) states to include California, Oregon and Washington. The mother has received welfare benefits from at

least six (6) counties in the state of California to include Contra Costa County, Riverside County, Yuba County, Yolo County, Placer County, and most recently Sacramento County."

The amended petition also alleged, pursuant to section 300, subdivision (g): "g-2 The minor's father . . . is deceased."

The factual allegations under subdivision (b) of section 300 of the petition, when considered together, along with their reasonable inferences, sufficiently establish the minor is at substantial risk of suffering serious physical harm or illness. Appellant's substantial transient history, her failure to obey the court's order, both to notify the Department and to remain in the transitional housing program, and her failure to keep the minor in school for any meaningful period of time, all combine to put the minor at risk.

As we said in *Alysha S., supra*, 51 Cal.App.4th at page 399, a "facially sufficient petition is necessary." (Italics omitted.) Even so, the pleading requirements contained in subdivision (f) of section 332 are broad in nature, designed simply to ensure the parents receive proper notice of the allegations pertaining to them. That provision merely requires the petition to contain "[a] concise statement of facts, separately stated, to support the conclusion that the child upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted." (§ 332, subd. (f).)

We conclude the petition contains the essential factual allegations that both state a basis for at least one ground of juvenile court jurisdiction and provide appellant adequate notice of the specific facts on which the petition is based. (Cf. *In re Jamie M.* (1982) 134 Cal.App.3d 530, 544; *Alysha S., supra*, 51 Cal.App.4th at pp. 399-400.) Consequently, we need not decide whether the allegations under section 300, subdivision (g), are also sufficient. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112-113 [if several grounds for jurisdiction are alleged, only one ground needs to be supported to affirm the juvenile court's exercise of jurisdiction].)

II

Appellant further contends substantial evidence does not support the jurisdictional findings or the order removing the minor from her custody. We disagree.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that matters of fact and credibility are questions for the trier of fact. (*In re Jason L., supra*, at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The

reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

a. *Jurisdiction*

Appellant does not claim there was insufficient evidence to support the allegations raised in the petition. Rather, she argues that her "history of homelessness and the possibility of future homelessness, a transient lifestyle, and inconsistent school attendance is insufficient to support a finding the child is at risk of serious harm within the meaning of section 300, subdivision (b)". We disagree.

b. *Removal*

"A dependent child may not be taken from the physical custody of . . . her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . [that] [¶] [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home . . . ." (§ 361, subd. (c).)

The record is clear; when the court returned the minor to her mother's custody after the initial petition was filed, it was on the express condition that mother remain in the Roseville Home Start program or notify the Department immediately if left. Mother failed to comply with either obligation. As a result, based on a protective custody warrant, the child was found with her mother in a motel in Sacramento on a three-day voucher from

a church with no prospect for housing once that voucher was exhausted.

When viewed through the lens of mother's transient past, it is evident that allowing the child to remain in mother's custody would result in mother continuing to put the child in situations where her physical or emotional safety and well-being would be in substantial danger. (§ 361, subd. (c).) There is no evidence Mother has alcohol or drug abuse addictions or other mental health problems. She is free to live a peripatetic life if she chooses; she cannot, however, drag her daughter along with her. (Cf. *In re Rikki D* (1991) 227 Cal.App.3d 1624, 1632 ["Children should not be required to wait until their parents grow up."], overruled on other grounds in *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, fn. 12.)

III

Appellant contends the court failed to make reasonable efforts to prevent or eliminate the need for removing the minor from the home.

A minor may not be removed unless "there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody" or "[t]he minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward himself or herself or others, and there are no reasonable means by which the minor's emotional health may be protected without removing the minor

from the physical custody of [the] parent . . . ." (§ 361, subd. (c)(1), (3).)

The minor was first removed from mother's custody at mother's request. When she was returned, mother failed to comply with the court's order to remain in the housing program or contact the Department if she left. The minor was found with her mother in a motel in Sacramento on a three-day voucher from a church with no prospect for housing once that voucher was exhausted. In neither situation were there reasonable means by which the Department could protect her short of removing her from mother's care. Accordingly, we find no error.

IV

Appellant further contends the Department failed to comply with the notice requirements of the ICWA. Specifically, appellant claims the Department failed to follow up on a request for further information from the Cherokee Nation.

On February 13, 2009, the Cherokee Nation sent to the Department a request for "additional information that includes maternal grandmother, Martha Morgan AKA Martha Foster's full name and date of birth." (Unnecessary capitalization omitted.) On April 1, 2009, the Department sent to the Cherokee Nation, notice of the upcoming six-month review hearing. That notice included the additional information regarding the minor's maternal grandmother (i.e., her full name and birth date).

Accordingly, any error in not providing the requested information previously was harmless because the tribe received

the information with ample time to intervene before appellant's parental rights were terminated.

DISPOSITION

The order of the juvenile court is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.